United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,452

UNITED STATES OF AMERICA, APPELLANT

v.

RUFUS BROWN, PAUL V. PROCTOR,
and SAMUEL A. WILLIAMS, APPELLEES

Appeal from the United States District Court for the District of Columbia

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THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROBERT A. SHUKER,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

Cr. No. 1804-69

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 1804-69

UNITED STATES OF AMERICA

v.

RUFUS BROWN, PAUL V. PROCTOR, SAMUEL A. WILLIAMS

RELEVANT DOCKET ENTRIES

Nov. 12, 1969	Presentment and indictment filed. c/m (16 counts).
Nov. 25, 1969	1, 2, 3: EACH ARRAIGNED: Plea "not guilty" entered. EACH. Counts One and Two - read. Each Rem. Green. J.
Jan. 7, 1970	2: Mo to suppress eye-witness identification. Mo for bill of particulars & for discovery and inspection c/s
	Memo of P&A in support of motions.
June 8, 1970	1, 2, 3: Hearing on motion to suppress eye-witness identification begun & continued to 6-9-70. . . . Green, J.
June 9, 1970	#1, 2, 3: Hearing on motion to suppress resumed and continued to 6-10-70.
	#1, 2, 3: Remanded. Green, J.

Relevant Docket Entries

June 10, 1970	1, 2, 3: Motion to suppress resumed: DENIED in part and taken under advisement in part; continued until 6-11-70. Each Remanded. Green, J.
June 11, 1970	Hearing on motion to suppress resumed; granted in part. EACH remanded Green, J.
June 18, 1970	1, 2, 3: Order suppressing any photographic of in-court identification of defts Rufus Brown & Paul Proctor by Mrs. Barbara Edgecomb. Green, J.
July 10, 1970	1, 2, 3: Govt's Notice of Appeal from motion to suppress identification evidence.

[Filed in open court November 12, 1969]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on September 2, 1969

Criminal No. 1804-69
Grand Jury No. Original

THE UNITED STATES OF AMERICA

v.

RUFUS BROWN, also known as RUTHER BROWN;
PAUL V. PROCTOR, also known as VERNARD P. PROCTOR;
SAMUEL A. WILLIAMS

Violation: 22 D.C. Code 2401, 2403, 2901, 3202, 502, 3204

(First Degree Murder—Killing While Perpetrating and Attempting to Perpetrate the Crime of Robbery; Second Degree Murder; Armed Robbery; Robbery; Assault With Dangerous Weapon; Carrying Dangerous Weapon)

The Grand Jury charges:

FIRST COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams did kill Israel S. Burka while perpetrating and attempting to perpetrate the crime of robbery, as set forth in the third, fourth, sixth and seventh counts of this indictment.

SECOND COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams, with malice aforethought, did shoot Israel S. Burka with a pistol, thereby causing injuries from which the said Israel S. Burka did die on or about June 27, 1969.

THIRD COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams, while armed with a dangerous weapon, that is, a pistol, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Sterling Beaver, property of Gold Liquors, Inc., a body corporate, of the value of about $500.00, consisting of about $500.00 in money.

FOURTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Sterling Beaver, property of Gold Liquors, Inc., a body corporate, of the value of about $500.00, consisting of about $500.00 in money.

FIFTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams assaulted Sterling Beaver with a dangerous weapon, that is, a pistol.

SIXTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams, while armed with a dangerous weapon, that is, a pistol, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Morris Swartz, property of Gold Liquors, Inc., a body corporate, of the value of about $3,307.76, consisting of about $3,307.76 in money.

SEVENTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Morris Swartz, property of Gold Liquors, Inc., a body corporate, of the value of about $3,307.76, consisting of about $3,307.76 in money.

EIGHTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams assaulted Morris Swartz with a dangerous weapon, that is, a pistol.

NINTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams assaulted Bernard A. Edgecomb with a dangerous weapon, that is, a pistol.

TENTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams assaulted Barbara B. Edgecomb with a dangerous weapon, that is, a pistol.

ELEVENTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams assaulted Fred Korn with a dangerous weapon, that is, a pistol.

TWELFTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams assaulted Garvey Alston with a dangerous weapon, that is, a pistol.

THIRTEENTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams assaulted Sedick N. McNeil with a dangerous weapon, that is, a pistol.

FOURTEENTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, Paul V. Proctor, also known as Vernard P. Proctor, and Samuel A. Williams assaulted James Davis with a dangerous weapon, that is, a pistol.

FIFTEENTH COUNT:

On or about June 27, 1969, within the District of Columbia, Rufus Brown, also known as Ruther Brown, did carry, openly and concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law.

SIXTEENTH COUNT:

On or about June 27, 1969, within the District of Columbia, Paul V. Proctor, also known as Vernard P. Proctor, did carry, openly and concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law.

/s/ Thomas A. Flannery
Attorney of the United States
in and for the District of
Columbia

A TRUE BILL:

/s/ Albert Barkin
Foreman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 1804-69

UNITED STATES OF AMERICA, PLAINTIFF

v.

RUFUS BROWN, DEFENDANT

MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION [1]

Defendant Rufus Brown, by his attorneys Carol Garfiel Freeman and James B. Blinkoff, respectfully moves this Court to suppress the pre-trial identification and any in-court identification by Sterling Beaver and Morris Swartz of defendant Brown as one of two persons who allegedly robbed the liquor store at 2501 Pennsylvania Avenue, N.W., Washington, D.C., on June 27, 1969, during which robbery Mr. Israel Burka was killed.

As grounds for this motion counsel state:

1. The defendant Brown was arrested on October 30, 1969, pursuant to an arrest warrant issued by the United States Magistrate. The affidavit of Plc. Raymond Pierson, Homicide Unit, Metropolitan Police Department, in support of the application for that arrest warrant is based on the uncorroborated statement of one Julis Vernon Foreman that the defendant Brown had admitted to Foreman complicitly in the above robbery and murder. The affidavit does not state that Foreman had previously given information to the police that had proven reliable, nor does it state that the police officers had corroborated or attempted to corroborate Foreman's statement in any way. We understand that no attempt was made to have

[1] There is no indication in the record that this motion was ever filed. It is not entered on the docket. The parties are in agreement, however, that it was filed on or about December 24, 1969, and was before the District Court at the time of the hearing which is the subject of this appeal.

[Filed January 7, 1970]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

Criminal No. 1804-69

UNITED STATES OF AMERICA, PLAINTIFF

v.

PAUL V. PROCTOR, DEFENDANT

MOTION TO SUPPRESS EYE-WITNESS IDENTIFICATION

Comes now defendant, Paul Proctor and adopts the Motion and Memorandum of Points and Authorities in support of said motion to suppress eye-witness identification filed heretofore on behalf of co-defendant, Rufus Brown except that defendant's motion refers only to the identification by Sterling Beaver, and adds the following points:

1. The name of the witnesses at the line-up were not provided to the defendant nor did the defendant have an opportunity for cross-examination of said witnesses; and further that the description of the suspect as given to the police was not made available to counsel at the line-up (nor was it made available at the preliminary hearing though repeated requests were made at that time) See Spriggs v. Wilson, U.S. App. D.C. #23548, decided October 16, 1969; the daily Washington Law Reporter November 17, 1969.

2. Both defendants were in the same nine man line-up numbered 3 and 4 respectively and there was no other bearded man in the line-up except Paul Proctor. See in

re Michael Raynard McKelvin No. 4764 D.C. Court of App. decided November 7, 1969.

/s/ Ira M. Lowe
IRA M. LOWE
Attorney for defendant
2700 Que Street, N.W.
Washington, D.C. 20007

Dated: Jan. 7, 1970

[Filed June 18, 1970]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 1804-69

UNITED STATES OF AMERICA

v.

RUFUS BROWN, PAUL PROCTOR,
& SAMUEL WILLIAMS

ORDER

This matter having come before the Court in the above-named defendants' Motion to Suppress Identification, and Testimony and evidence having been received by the Court in a pre-trial identification hearing on June 8, 9, and 10, 1970, it is by the Court this 18th day of June, 1970,

ORDERED that any photographic or in-court identification of the defendants Rufus Brown and Paul Proctor by Mrs. Barbara Edgecomb be suppressed.

/s/ June L. Green
Judge

[Filed July 10, 1970]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 1804-69

UNITED STATES OF AMERICA

v.

RUFUS BROWN, PAUL V. PROCTOR, SAMUEL A. WILLIAMS

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this Court entered June 18, 1970, granting the defendants' motion to suppress identification evidence.

/s/ THOMAS A. FLANNERY
THOMAS A. FLANNERY
United States Attorney

/s/ JOHN A. TERRY
JOHN A. TERRY
Assistant
United States Attorney

/s/ ROBERT A. SHUKER
ROBERT A. SHUKER
Assistant
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[Filed July 13, 1970]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 1804-69

UNITED STATES OF AMERICA

v.

RUFUS BROWN, PAUL V. PROCTOR, SAMUEL A. WILLIAMS

CERTIFICATE OF THE
UNITED STATES ATTORNEY

Pursuant to Section 1301 of the Omnibus Crime Control and Safe Streets Act of 1968, Public Law No. 90-351, 18 U.S.C. § 3731, I hereby certify to the Honorable June L. Green that the appeal noted herein is not taken for purpose of delay and that the evidence suppressed is a substantial proof of the charge pending against the defendant.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

[Certificate of Service Omitted]

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BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,452

UNITED STATES OF AMERICA, APPELLANT

v.

RUFUS BROWN, PAUL V. PROCTOR AND SAMUEL A. WILLIAMS, APPELLEES

Appeal from the United States District Court for the District of Columbia

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Cr. No. 1804-69

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
ROBERT A. SHUKER,
ROBERT J. HIGGINS,
Assistant United States Attorneys.

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellant, the following issue is presented:

Whether the Sixth Amendment requires the presence of counsel at a pre-trial witness interview in the prosecutor's office in the course of which the prosecutor shows to a witness a photograph of a lineup at which the defendants were represented by counsel?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,452

UNITED STATES OF AMERICA, APPELLANT

v.

RUFUS BROWN, PAUL V. PROCTOR AND SAMUEL A. WILLIAMS, APPELLEES

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

REFERENCES TO RULINGS

The court's ruling at the conclusion of the hearing on the motion to suppress evidence is found at Tr. 401-403, 407-409. The court's written order filed on June 18, 1970, implementing its oral ruling is found at App. ——.

STATEMENT OF THE CASE

By indictment filed on November 12, 1969, appellees were charged with felony murder and related offenses

arising from the shooting of Israel Burka in the course of a robbery of Gold's Liquor Store at 25th Street and Pennsylvania Avenue, N.W., on June 27, 1969. On June 11, 1970, after a three day pre-trial hearing, the Honorable June L. Green granted the motion of appellees Brown and Proctor to suppress any identification of them by Mrs. Barbara Edgecomb. A formal order to that effect was filed on June 18, 1970. The Government, under the authority of 18 U.S.C. § 3731 (Supp. IV, 1965-1968), appeals from that order.

The testimony presented at the suppression hearing and the record in the case establish the following:

On June 27, 1969, two armed men, since identified by Government witnesses as appellees Brown and Proctor, entered Gold's Liquor Store and told everyone to "put their hands up." The first gunman, identified as Proctor, fired a shot into the ceiling and placed his gun in the back of Sterling Beaver, a Gold's employee, while Brown covered the rest of the store. Just prior to the shot, Israel Burka, who had been sitting on a stool next to the employee on whom Proctor was holding the gun, rose and started toward the back of the store. Proctor moved his arm away from Beaver and, saying nothing, shot Israel Burka. For a few seconds Burka stood there, blood streaming from his back. Then he fell to the floor, face down at the feet of another Gold's employee named Fred Korn (Tr. 35-37, 68-69, 126-127).

Proctor then ordered Korn and Beaver to give him the money from each of their cash registers (Tr. 37, 126-127). Next he ordered Beaver to "hurry up and open the safe, because I will kill everyone in here" (Tr. 38). Beaver did not know the combination and asked Morris Swartz, the store manager, to carry out Proctor's order. Swartz agreed and was taken into the back room by Brown. Shortly after, as Swartz and Brown were returning to the front of the store, Proctor herded everyone present behind the counter and ordered them to lie on the floor for five minutes. Mrs. Barbara Edgecomb, a

customer who had arrived at the store with her husband shortly before the gunmen, was the first to file behind the counter. She stopped next to Israel Burka, who was on his knees, his forehead on the floor. Blood was everywhere. Burka coughed, and Mrs. Edgecomb started to bend down to help him but was stopped by her husband. As she looked up, the gunman who had shot Burka was "right there"—just three and a half feet away (Tr. 37-39, 126-127; 151-157). Moments later the gunmen made their escape. The entire robbery had taken seven to eight minutes (Tr. 66, 131).[1] Israel Burka died an hour later.

In October 1969 one Julius Foreman informed the police that on the night of the robbery appellees Brown and Proctor told him they had robbed Gold's Liquors. Proctor also said he had "shot an old man." According to Foreman, appellee Williams drove the get-away car. On this basis appellees were arrested and on November 4 appeared in a lineup at which they were represented by counsel. At the lineup both Mr. Beaver and Mr. Korn identified Proctor and Brown as the robbers.[2] On November 12, the grand jury returned a sixteen-count indictment charging all three appellees with felony murder, second-degree murder, armed robbery, robbery and assault with a dangerous weapon.[3]

In late April the trial date, originally set for May 11, was continued to June 8. During the month of May witnesses in the case were interviewed by the Assistant United States Attorney who was to represent the Government at trial. During their interviews both Mr. Beaver and Mr. Korn were shown a picture of the lineup which they had witnessed some six months before (Government Exhibit Number 2; Tr. 85, 117-120; 140). The

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[1] The indictment charges that $3,807.76 was stolen.

[2] In the lineup room Korn identified only Brown. He left the lineup room with Detective Greenwell and walked directly to Greenwell's office. There he said he also recognized Proctor (Tr. 331-333).

[3] Appellees Brown and Proctor were also charged with carrying a dangerous weapon.

prosecutor interviewed Mrs. Edgecomb on May 19 in the presence of Detective Raymond Pierson of the Homicide squad. During the interview Mrs. Edgecomb was also shown a photograph of the November 4 lineup. Mrs. Edgecomb first identified the picture as representing the lineup she had attended, though she noted that "of course they look a lot different from the way they did upon the stage" (Tr. 185). Without being asked to do so, she then identified Brown and Proctor from the photograph as the robbers.[4] Mrs. Edgecomb explained that she was unable to make an identification at the lineup because the lighting conditions "made people's faces look like blobs" (Tr. 162). She said she had not stayed at the lineup very long "because I just couldn't make anything there—their faces just so well lit up that there wasn't any point in staying there, and looking at them" (Tr. 165). "The complexions just, well, the faces were so lighted up. You had lights above them and shining from the base, and in front of them. *I just didn't think I could fairly say for sure*" (Tr. 161).[5]

A week before the scheduled trial date the prosecutor apprised appellees' counsel of Mrs. Edgecomb's identification and of his intention to offer this testimony and, if possible, to have Mrs. Edgecomb make an in-court identification (see appellees' motion to dismiss this appeal, filed in this Court on July 29, 1970, p. 4).

A pre-trial identification hearing was held by the trial judge on June 8, 9, 10 and 11, 1970. At the conclusion of that hearing the trial judge ruled that the November 4 lineup was properly conducted and that the lineup identification of the two Gold's employees, as well as any in-court identification which they would be able to make,

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[4] Her identification was not positive. Mrs. Edgecomb said that she did not think "a camera [could] take people as they really are" (Tr. 175) but that she thought she could identify the robbers in person in the courtroom.

[5] Testimony concerning Mrs. Edgecomb's identification in the prosecutor's office and the circumstances surrounding it is to be found at Tr. 161-166, 174-176, 181, 183-185, 225-230, and 238-243.

was admissible (Tr. 401-403). The trial judge, however, suppressed Mrs. Edgecomb's post-lineup photographic identification and further ordered that Mrs. Edgecomb "should not make an in-court identification of the defendants at the time of her appearance here in fear it might be trainted in some way by the recent viewing of the photograph" (Tr. 408; *cf.* Tr. 401-402, 407, 409).[6]

ARGUMENT

The Sixth Amendment does not require the presence of counsel at a pre-trial witness interview in the course of which the prosecutor shows the witness a photograph of a lineup at which the defendants were represented by counsel

In suppressing Mrs. Edgecomb's identification testimony the trial judge held that "although there is no question in the Court's mind that there was *nothing improper* insofar as [Mrs. Edgecomb's] having seen the photographs in the prosecutor's office . . . it is felt that since this was after the lineup and close to trial *it would have perhaps been better if counsel had been present* at the time" (Tr. 407-408) (emphasis added). If counsel had been present, the court stated, "there would have been no question about it" (Tr. 408). Under the circumstances, "with an abundance of caution as far as the defendants are concerned" (Tr. 408), the court held that no identification by Mrs. Edgecomb would be admissible in trial. The trial judge's ruling thus specifically rejected the existence of any *Stovall*[7] violation but postulated a rule, not yet ac-

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[6] Appellees were not present in court during the pre-trial suppression hearing, so the question of whether Mrs. Edgecomb would in fact identify them in person is still unresolved. But see Tr. 175.

[7] *Stovall* v. *Denno*, 388 U.S. 293 (1967). In this connection we note that there is nothing in the record to support any claimed due process violation. The photograph depicted a lineup during which appellees were represented by counsel. Moreover, despite vigorous cross-examination of both Mrs. Edgecomb and Detective Pierson, nothing in the record indicates that there was anything at all suggestive either about the way in which the photograph was shown to Mrs. Edgecomb or about any other circumstances surrounding this identification.

cepted in this or any other jurisdiction, that in the absence of defense counsel a prosecutor may not show a lineup photograph to a witness during trial preparation even when the defendants were represented by counsel at the lineup. We respectfully submit that such a ruling is clearly erroneous and should not be allowed to stand.

The federal courts have consistently refused to apply the rule of *United States* v. *Wade*, 388 U.S. 218 (1967), to photographic identifications. Since *Simmons* v. *United States*, 390 U.S. 377 (1968), the only post-*Wade* case in the Supreme Court dealing with photographic identifications, no court has suggested that *Wade* applies to pre-arrest photographic identifications regardless of whether they take place before or after suspicion has "focused" on the accused.[8] Moreover, this Court has implicitly held that *Wade* does not apply to photographic identifications which occur even after arrest,[9] and the Second, Fourth, Fifth, Ninth and Tenth Circuits have explicitly and unequivocally taken the same position.[10]

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[8] In *Simmons* "the investigation could certainly be said to have already come to focus on Simmons as a prime suspect." *United States* v. *Kirby*, —— U.S. App. D.C. ——, —— n. 2, 427 F.2d 610, 612 n.2 (1970). In this regard we stress that the time at which suspicion "focuses" on the accused, rather than the time at which he is arrested, has traditionally marked the constitutional turning point. Thus *Simmons* and its progeny can themselves be read as suggesting that a photographic identification may not be rendered automatically defective because of the absence of counsel but rather "must be [individually] considered on its own facts." 390 U.S. at 384.

[9] *United States* v. *Hamilton*, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969), in which the briefs show that the photographic identification complained of took place after the arrest of the defendant; see *United States* v. *Kirby*, *supra* note 8, 427 F.2d at 612 and n.2.

[10] *United States* v. *Bennett*, 409 F.2d 888 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969); *United States* v. *Collins*, 416 F.2d 696 (4th Cir. 1969), *cert. denied*, 396 U.S. 1025 (1970); *United States* v. *Ballard*, 423 F.2d 127 (5th Cir. 1970); *United States* v. *Sartain*, 422 F.2d 387 (9th Cir. 1970); *Rech* v. *United States*, 410 F.2d 1131 (10th Cir.), *cert. denied*, 396 U.S. 970 (1969). See also *United States* v. *Robinson*, 406 F.2d 64 (7th Cir.), *cert. denied*, 395 U.S. 926 (1969). The law in the Third Circuit appears to be in a state of flux. *Compare United States* v. *Conway*, 415 F.2d 158 (3d Cir. 1969), *with United States* v. *Zeiler*, 427 F.2d 1305 (3d Cir. 1970).

This almost universal [11] rejection of the argument that *Wade* should apply to post-custodial photographic identifications provides the background against which we review the purposes of *Wade* and the facts of this case.

In *Wade* the Supreme Court held that counsel was required at a lineup or other confrontation: first, so that the accused would not have to "stand alone" at this "critical stage" of the proceedings against him; [12] second, in order to prevent unfairness in the confrontation; [13] and third, in order to enable counsel to reconstruct what had occurred at that proceeding.[14] In this case Mrs. Edgecomb made her unsolicited identification from the photo-

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[11] Only two courts have held that the *per se* rule of *Wade* and *Gilbert* v. *California*, 388 U.S. 263 (1967), should be applied to post-arrest photographic identifications. In each such instance the court has been primarily concerned with the possibility that any other rule might allow the police to circumvent *Wade* by showing suggestive photographs to witnesses in order to prime them for a later identification. See *United States* v. *Zeiler*, *supra* note 10, 427 F.2d at 1307; *Commonwealth* v. *Whiting*, —— Pa. ——, ——, 266 A.2d 738, 740 (1970). We submit that so long as the photographs are preserved, such abuses, if and when they occur, may be remedied by applying the exclusionary rule of *Stovall* v. *Denno*, *supra* note 1, and therefore provide no real motivation for expanding the coverage of *Wade*. See cases cited in footnote 17, *infra*. We do not include Nevada among those jurisdictions which have adopted a *per se* rule. *Compare Thompson* v. *State*, 451 P.2d 704, 707 (Nev.), *cert. denied*, 396 U.S. 893 (1969) ("substituted" photographic display), *with Carmichael* v. *State*, 467 P.2d 108 (Nev. 1969) (failure to preserve photographs); and see this Court's comment in *United States* v. *Kirby*, *supra* note 8, 427 F.2d at 612-613.

[12] 388 U.S. at 226.

[13] *Id.* at 235-236.

[14] *Id.* at 230-232. In emphasizing the accused's inability to reconstruct the conditions obtaining at the time of the confrontation, the court emphasized the uniquely ephemeral character of the then typical lineup in which the participants other than the defendant normally remained anonymous. Also important is the fact that the unusual lighting conditions and the method of filling one room with large numbers of people, including police, clerks, witnesses, defendants, other lineup participants and onlookers, produces the kind of confused situation which is inherently difficult to reproduce. *Id.* at 230 and n.13, 232 n.15; see *United States* v. *Collins*, *supra* note 10.

graph of a lineup at which appellees had been represented by counsel.[15] The identification took place a few weeks prior to the date on which the case was scheduled for trial. Present were the Assistant United States Attorney assigned to try the case and Detective Pierson of the Homicide Squad; appellees, of course, were not present. After the identification the prosecutor took pains to notify appellee's counsel of what had occurred, and subsequently a lengthy hearing was held at which the photograph in question was introduced in evidence. We submit that these facts denote a fairness of procedure which dramatically supports the reasoning of the many courts which have refused to expand the *Wade* rule so as to embrace post-custodial photographic identifications.

In the first place, neither *Wade* nor any other decision of the Supreme Court even suggests that a defendant's right to counsel confers on his lawyer the right to be present in situations in which the defendant is not himself a participant.[16] In the second place, appellees were represented by counsel at the lineup and thus secured the benefit of the preventive protections which *Wade* envisioned. We emphasize that *Wade* was calculated to protect the accused only from unfairness in the actual confrontation, and therefore it can hardly be said that *Wade*, if applied to a photograph, will protect the accused from suggestivity other than which is apparent from the photograph itself. In the third place, the record makes it clear that counsel in this case were in fact able to "reconstruct" the identification within the meaning of *Wade*. While not denying this, the trial judge noted that "there is always a queston in defense counsel's minds, as to exactly what did happen at that time" (Tr. 409). With due deference we submit that if appellees' counsel had any additional questions they should have asked them at the suppression hearing. The amenability of photo-

[15] In this respect this case is on all fours with *United States* v. *Collins*, *supra* note 10; *cf. United States* v. *Cunningham*, 423 F.2d 1269, 1274-75 (4th Cir. 1970) (Winter, J.).

[16] See *United States* v. *Bennett*, *supra* note 10, 409 F.2d at 899.

graphic identifications to later reconstruction in court has been thoughtfully considered by this and other courts.[17] Their conclusion has consistently been that the preservation of the photographs for scrutiny by the court, which occurred here, operates as effective insurance against the dilution of the defendant's right to a hearing on the question of whether the identification proceeding was properly conducted.[18]

Finally, we emphasize that this identification took place during the prosecutor's preparation for trial. The trial judge here ruled that there was not "anything at all improper about counsel's having shown [Mrs. Edgecomb] the photograph or actually her looking it over" (Tr. 408-409). More than that, we submit that a prosecutor in a first-degree murder case who knows that an eyewitness to the crime did not make an identification at a lineup she attended would be derelict in his duty if he did not endeavor to determine, before trial, precisely what her reaction to the lineup was.[19] Every court which has considered the question has decisively rejected the argument that *Wade* confers on defense counsel the right to be present at a photographic identification conducted by the

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[17] See *United States* v. *Kirby*, *supra* note 8; *United States* v. *Hamilton*, *supra* note 9; *Patton* v. *United States*, 131 U.S. App. D.C. 197, 403 F.2d 923 (1968); *United States* v. *Clark*, 289 F. Supp. 610, 620-622 and n.15 (E.D. Pa. 1968); *People* v. *Green*, 3 Cal. App. 3d 240, 83 Cal. Rptr. 491 (1970).

[18] *Wade* is concerned with the difficulties posed by the lineup confrontation. Here the photograph merely reproduced the lineup at which appellees had counsel. Nothing in *Wade* confers on defense counsel the right to question witnesses at the lineup or, indeed, anywhere else except in court. Similarly here, any circumstances counsel deemed relevant could have been, and presumably were, developed at the suppression hearing simply by asking the witnesses what happened. See footnote 14, *supra*.

[19] Did failure to make an identification, for example, mean that the witness was certain the killer was *not* among those at the lineup? Had that been Mrs. Edgecomb's response, the information would no doubt have been available to appellees under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

prosecutor during trial preparation.[20] As Judge Friendly put it in *Bennett*:

> None of the classical analyses of the assistance to be given by counsel . . . suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when, as here, the defendant is under arrest; counsel is rather provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proffered. Many other aspects of the prosecution's interviews with a victim or a witness to a crime afford just as much opportunity for undue suggestion as the display of photographs; so, too, do the defense's interviews, notably with alibi witnesses.[21]

The Tenth Circuit said it most succinctly:

> What is complained of here is nothing more than preparation for trial by the Government. No lineup is involved and there was no form of confrontation of the accused.[22]

But certainly a California court of appeals made the point most forcefully:

> To hold that an accused has a right, founded upon the Constitution, to have his attorney present at such trial preparation conferences would be fatuous. The constitutional right to the assistance of counsel does not confer the privilege of insinuating him into

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[20] *United States* v. *Bennett*, *supra* note 10; *United States* v. *Cunningham*, *supra* note 15; *McGee* v. *United States*, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); *People* v. *Adair*, 2 Cal. App. 3d 92, 82 Cal. Rptr. 460 (1969); *Johnson* v. *State*, —— Md. App. ——, 264 A.2d 280 (1970); *cf. People* v. *Lineman*, 5 Cal. App. 3d 1, 84 Cal. Rptr. 891 (1970); *Bailey* v. *State*, 6 Md. App. 496, 252 A.2d 85 (1969); *Barnes* v. *State*, 5 Md. App. 144, 245 A.2d 626 (1968).

[21] *United States* v. *Bennett*, *supra* note 10, 409 F.2d at 899-900.

[22] *McGee* v. *United States*, *supra* note 20, 402 F.2d at 436.

the prosecutor's office at all important phases of trial preparation.[23]

We submit, therefore, that neither *Wade* nor the Sixth Amendment itself necessitates the exclusion of Mrs. Edgecomb's identification testimony. In conducting his interview of Mrs. Edgecomb the prosecutor showed her a photograph of a lineup at which appellees had all the benefits bestowed by the Supreme Court in *Wade*. When she identified two of the persons depicted in that photograph,[24] the prosecutor quite properly notified defense counsel of her response. At no time was there a breach of anyone's right to counsel under the Sixth Amendment, or indeed, as the trial court held (Tr. 407-409), of anyone's Fifth Amendment due process rights. Absent any such constitutional violations, Mrs. Edgecomb's identification testimony must be admitted.[25]

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[23] *People* v. *Adair*, *supra* note 20, 2 Cal. App. 3d at 94, 82 Cal. Rptr. at 462.

[24] Of course, if the photographic identification is admissible, there can be no suppression of any in-court identification on the ground that it is the fruit of an improper photographic identification.

[25] We stress that in view of 18 U.S.C. § 3502, enacted as part of section 701 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 (June 19, 1968), which states that eyewitness testimony "shall be admissible in evidence in a criminal prosecution in any [federal] trial court," this is peculiarly a constitutional question and is not amenable to the exercise of the Court's supervisory power.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be reversed and this case remanded to the District Court with directions to deny appellees' motion to suppress evidence.

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BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,452

UNITED STATES OF AMERICA,

Appellant,

v.

RUFUS BROWN,
PAUL V. PROCTOR AND
SAMUEL A. WILLIAMS

Appellees.

Appeal from the United States District
Court for the District of Columbia

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Cr. No. 1804-69

October 9, 1970

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED

In the opinion of appellees, the following issues are presented:

I. Is a post-indictment photographic identification proceeding a "critical stage" of the criminal process entitling a defendant, under the Sixth Amendment as interpreted in United States v. Wade and subsequent cases, to representation by counsel to enable him effectively to challenge at trial the fairness and accuracy of any resulting identification?

II. Based upon the undisputed facts that an identification witness proffered by the Government:

- tried to forget about the June 27, 1969, robbery-murder after it happened,
- chose photographs of persons other than appellees Brown and Proctor as "resembling" the robbers during the next four months,
- did not identify the picture of either appellee from photographs of ten men shown her on October 25, 1969,
- saw the same pictures of Brown and Proctor in a group with photographs of six different men on October 26 and only tentatively chose Brown and one Harling, but did not identify Proctor,

- tentatively identified appellees from a picture of the lineup shown her some eleven months after the crimes, within a few weeks of the trial, in the prosecutor's office and in the absence of defense counsel,

did the trial court properly conclude that these procedures were "so unnecessarily suggestive and conducive to irreparable mistaken identification" that admission of identification testimony by this witness would deny appellees due process of law?

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This is a pretrial appeal by the Government, pursuant to Section 3731, Title 18, United States Code, from an order of the District Court entered on June 18, 1970, granting a motion by appellees Brown and Proctor[1/] to suppress

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1/ None of the witnesses presented at the hearing on the motion to suppress identified appellee Williams (See Tr. 122-23, 146-47, 187), and accordingly Williams has not

[continued]

identification testimony by Mrs. Barbara Edgecomb, one of three identifying witnesses (Tr. 407-09). Appellees' motions to suppress identification testimony by the two other witnesses, Sterling Beaver and Fred Korn, were denied (Tr. 401-02, 403).[2/] The trial of the case has been continued pending determination of this appeal.

The Offenses Charged

Appellees are charged in an indictment, filed November 12, 1969, with felony-murder, second degree murder, armed robbery, robbery, and assault with a dangerous weapon, all charges arising out of the June 27, 1969 robbery of the

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1/ [continued from preceding page]

formally moved to suppress any identification testimony. Apparently the only witness who inculpates Williams is the informant, Julius Foreman. See p. 8 infra, Tr. 391. Insofar as testimony by eyewitnesses might tend to corroborate that of the informant, appellee Williams joined in the motions made by his co-defendants below (Tr. 364) and on this appeal seeks affirmance of the trial court's ruling suppressing Mrs. Edgecomb's identification testimony.

2/ The propriety of this ruling, of course, cannot be challenged by appellees at this time. Di Bella v. United States, 369 U.S. 121 (1962).

The defense also sought below to suppress any identification testimony on the theory that the lineup itself, and any identification testimony resulting therefrom, were the fruits of an unlawful arrest (Tr. 356; see Tr. 350-56). The trial judge rejected this argument, finding probable cause for issuance of the arrest warrants (Tr. 401). Neither the Government nor appellees have treated this ruling as being in issue on this appeal. See United States v. Blue, 384 U.S. 251 (1966).

Gold Liquor Store during which Mr. Israel S. Burka was shot and killed.[3/] At the hearing on the motions to suppress evidence, Sterling Beaver, Fred Korn, and Mrs. Edgecomb testified in some detail about the events of that afternoon. From their testimony, it appears that at about 3:15 p.m. on June 27, 1969, two men, whom the Government contends were appellees Brown and Proctor, entered the Gold Liquor Store at 2501 Pennsylvania Avenue, N.W. The first man, allegedly Brown, walked toward the right rear of the store, drew a gun, and ordered the eight customers and sales personnel who were in the store to raise their hands. The second man, who was also armed, went behind a counter at the left of the store, to a position behind Mr. Beaver, a salesman, while approaching Mr. Beaver this second man, supposedly Proctor, fired a shot into the air. Apparently within seconds, Mr. Burka, who was sitting beside Mr. Beaver, rose from his stool and started toward the rear of the store; the second robber then shot Mr. Burka, who collapsed behind the counter (Tr. 34-37, 40-45, 69, 125-27).

The second man then obtained the money from two cash registers from Mr. Beaver and Mr. Korn, also a salesman (Tr. 37, 126-29), while the first robber was herding Morris

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3/ Appellee Proctor is also charged with carrying a dangerous weapon; a similar count against Brown was dismissed by the Government immediately before the hearing on the motions to suppress (Tr. 18).

Swartz, the manager of the store, and four customers (Mr. and Mrs. Bernard Edgecomb, James Davis and Master Sedick McNeil) behind the counter at the rear of the store (Tr. 43, 127, 150-51, 154). The first man then went into a back room with Mr. Swartz and obtained the money from the safe, while the second man stood watch in the store (Tr. 38-39, 127, 152-54). During this time, Garvey Alston, a customer, entered the store and was directed by the second man to lie down behind the counter.(Tr. 38). When Mr. Swartz and the first man emerged from the back room, Mr. Swartz and Mr. Beaver were also told to lie down behind the counter. With the admonition that the witnesses were not to move for five minutes, the robbers made their escape (Tr. 39, 127, 156-57). The robbery lasted between five and ten minutes, according to Mr. Korn (Tr. 131), for seven or eight minutes, as Mr. Beaver recollects (Tr. 65-66).

Mrs. Edgecomb's Observations and Recollections

Mrs. Edgecomb did not see the robbers as they entered the store but only became aware of their presence after Mr. Burka had been shot, when her husband caught her arm and said that a holdup was in progress (Tr. 150-51). Then the first robber came into sight and directed the Edgecombs and Mr. Swartz, who had been serving them, to come forward from

behind a large display piece (Tr. 149-51, see Tr. 42). As they walked forward, Mrs. Edgecomb "tried to kind of shrink behind Mr. Swartz" (Tr. 151). It was at this point that she first saw the second robber, who was beside Mr. Beaver behind the counter at the other end of the store (Tr. 151-53).

Pursuant to the directions of the second robber, Mr. Swartz moved off to open the safe and the other witnesses filed behind the counter; Mrs. Edgecomb bent down to attend to Mr. Burka (Tr. 154-55). When she looked up, the second robber was "right there", a few feet away (Tr. 155-56). It was at this time, in a "very dark corner", that she saw the face of the second gunman (Tr. 159-60). This robber ordered the victims to get down on the floor, and Mrs. Edgecomb looked down (Tr. 156). She then was half way down on the floor; the robber pushed one of the salesmen between them, and the group staggered backwards (Tr. 156).

Mrs. Edgecomb testified that she was able to see the face of the first robber distinctly, but only when they were standing by the wine display, before they went behind the counter. She was unable accurately to estimate how long she saw him at this time; it "seemed to" her that it was for about three minutes "but everything [she thought] was exaggerated as far as time is concerned."(Tr. 158). After that, she only caught a quick glimpse of this first

robber, not a good view (Tr. 156, 158-59). She described the appearance of both robbers in some detail (Tr. 159-61).

Mrs. Edgecomb had never seen either of the robbers before the offenses on June 27 (Tr. 163-64). She could not recall describing them to the police who responded to the store, because "it was terrible" (Tr. 168). The second robber had repeatedly threatened to kill everyone unless Mr. Swartz opened the safe (Tr. 153-54).

Mrs. Edgecomb did not talk to her husband after the robbery about the appearance of the gunmen. As she put it, "we wanted to forget about it at that time. I didn't want to think about it."(Tr. 171). Indeed, Mrs. Edgecomb has never talked with her husband about the description of the robbers because, as she said, "I just don't believe in thinking about destructive things" (Tr. 171). Moreover, between the lineup on November 4, 1969, and May 19, 1970, when she was interviewed in the prosecutor's office, Mrs. Edgecomb did not talk to anyone about the case (Tr. 172). She testified that she had not heard that two or three people had been charged with the crimes, and that she "[didn't] want to know anything about it" (Tr. 173).

The Identification Procedures

Over the course of the four months following the robbery, various members of the Homicide Squad of the Metropolitan Police Department showed several groups of photographs to

Messrs. Beaver and Korn, and to Mr. and Mrs. Edgecomb (Tr. 49, 77-79, 114-15, 135-36, 215-25, 311-13, 315-18). Some of these photographs were chosen by Mr. Beaver and Mrs. Edgecomb as resembling one or the other of the robbers (Tr. 164-65, 182-83, 215-23, 315-18). However, it was not until October 25 that any of these witnesses were shown photographs of Brown or Proctor (See Tr. 99-100, 200-02, 215-24, 233-34, 311-12, 315-17).

On the evening of October 25, 1969, two Homicide detectives brought a packet of ten photographs to Mrs. Edgecomb's home; among the pictures were a photograph of Proctor, taken on April 26, 1969, and an undated one of Brown (Tr. 211, 345-46).[4/] Mrs. Edgecomb did not identify anyone at this time (Tr. 203-06). On the following day, October 26, the police showed Mrs. Edgecomb a group of eight photographs.[5/] Two of these pictures were of Brown and Proctor and are identical to the photographs of these defendants that Mrs. Edgecomb had seen the previous night. The remaining six pictures were of different individuals, whose pictures Mrs. Edgecomb had not seen the night before. This time she said that she

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4/ This packet of photographs was received in evidence at the hearing as Government Exhibit 5 (Tr. 204, 206) and is part of the record on appeal.

5/ This group of photographs was Government Exhibit 10 in evidence at the hearing (Tr. 328, 329, 347-48) and is also part of the record on appeal.

"liked" the pictures of Brown and one Jerome Harling, but that "because of the seriousness of the case she would like to see them in a lineup" (Tr. 327-30, 333-34; see Tr. 164-65).

Within a few days, on October 29 and 31, the police obtained arrest warrants for the three defendants, based on written statements given to the Homicide Squad on October 28 and 30 by one Julius V. Foreman. According to the summaries of these statements in the affidavits of two police officers submitted in support of the applications for the warrants, Foreman claimed that on the night of the robbery, some four months earlier, he had met with the three defendants at the Hilltop Apartments in Washington and that the defendants had stated that they had held up the Gold Liquor Store and that Proctor had "shot a 'dude'." Foreman asserted that Brown and Proctor had actually gone into the store, and Williams had driven the getaway car. No mention was made in these affidavits of Mrs. Edgecomb's tentative identification of Brown's photograph on October 26.

On November 4, 1969, following their arrests, Brown and Proctor appeared in a lineup held at police headquarters. Four of the six eyewitnesses who viewed the lineup either did not identify anyone or identified individuals other than the defendants (see Tr. 244-45). Two of the eyewitnesses, Messrs. Beaver and Korn, identified both Brown and

Proctor (Tr. 47-48, 124-124A, 129-30; see Tr. 331).[6/]

On their way to view the lineup on November 4, Mrs. Edgecomb told her husband, "I thought that I would know them [the robbers] again" (Tr. 172). However, she did not identify anyone from that lineup (Tr. 161-62, 165).[7/] At the hearing below, she claimed that during the lineup she told a policeman that she could not identify anyone because the lights were so bright that "[t]hey just made people's faces look like blobs" (Tr. 162, 165-66, 175). However, she testified, she specifically rejected a policeman's offer to turn down the lights, because she was "afraid" that the persons in the lineup would then be able to see her (Tr. 166, 176, 181). Yet none of the policemen who testified about the lineup heard Mrs. Edgecomb say anything that night about the lighting conditions (Tr. 238-40, 336).[8/]

Sgt. Raymond Pierson of the Homicide Squad, who was at the

6/ On November 6, at the preliminary hearing, Mr. Beaver repeated his identification of these defendants (Tr. 124-124A).

7/ Despite Mrs. Edgecomb's request on October 26 (Tr. 329), no effort was made to place Harling in that lineup or to determine whether he was available to appear in the lineup (Tr. 334-36; cf. Tr. 278, 305-06).

8/ Sgt. Pierson testified that Mrs. Edgecomb did complain on May 19, 1970, that the lights at the lineup had been too bright (Tr. 226, 227, 229).

lineup, recalled that Mrs. Edgecomb had said "she couldn't recognize any of them because all of their faces looked too full" (Tr. 240).

Mrs. Edgecomb testified that immediately after the lineup she had told an unidentified police officer that she wanted to see a photograph of it. However, it was not until May 19, some six and one half months later, that her request was granted.(Tr. 181, 183-85). On that day, in the presence only of the prosecutor and Sgt. Pierson (Tr. 173), Mrs. Edgecomb saw the photograph that had been taken of the November 4 lineup.[9/] After indicating that she recognized it as the picture of the lineup she had attended, Mrs. Edgecomb "was asked to study the picture" (Tr. 229). According to Sgt. Pierson, Mrs. Edgecomb "looked at [the picture] closely at least a couple minutes" (Tr. 230), and began to comment on the lighting deficiencies of the original lineup (Tr. 227, 229, 230). She said that the lineup photograph was "a little bit clearer than the actual lineup" (Tr. 227). Then Mrs. Edgecomb "started to make particular attention to" three of the individuals, including Brown and Proctor. "Later on she more or less focused on" the defendants, stating that Proctor "resembled the subject ... that did the

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9/ This photograph was Government Exhibit 2 in evidence at the hearing (Tr. 47-48, 49) and is part of the record on appeal.

shooting" and that Brown "could have been the second man in the store during the holdup," that these two men "looked like" the robbers (Tr. 162-63, 174, 225-31). Although Mrs. Edgecomb did not state that she was positive of the identities of the defendants, "the more she looked at this picture, the more she felt that the Number three subject [Brown] and the Number four subject [Proctor] ... were responsible for this offense" (Tr. 228). The picture was in front of Mrs. Edgecomb for approximately ten or fifteen minutes, during "the great majority of the interview" (Tr. 229-30).

The Motions to Suppress

Shortly after the return of the indictment, counsel for Brown and Proctor filed written motions to suppress any identification testimony by the two witnesses who had identified the defendants at the lineup on November 4,[10/] these motions

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10/ The motions referred to Messrs. Beaver and Morris Swartz as the identifying witnesses, based on information provided to defense counsel by the prosecutor. It was later discovered that Fred Korn, rather than Mr. Swartz, was the second person who identified the defendants at the lineup, see Tr. 244-45, and the motions as litigated were directed to Mr. Korn's testimony.

These motions were based on various grounds then apparent: first, that the lineup identifications were the fruit of an unlawful arrest, since the warrants had been based on the uncorroborated statement of a previously unknown informant; second, that the circumstances surrounding the identifications might have been such as to render the procedure unnecessarily suggestive and thus in violation of the principles announced in Stovall v. Denno, 388 U.S. 293 (1967) and subsequent cases; and third, as to Proctor, that the

[continued]

were scheduled for hearing immediately before the trial.

The week before trial was to begin, the prosecutor advised defense counsel of Mrs. Edgecomb's tentative identification from the lineup photographs and that he planned to call her as an identification witness for the Government (Tr. 20-21).[11] Accordingly, at the outset of the hearing on June 8 defense counsel supplemented their earlier written motions to suppress with an oral motion to suppress any in-court or pretrial identification by Mrs. Edgecomb as in violation of their right to counsel as set forth in United States v. Wade, 388 U.S. 218 (1967). (Tr. 20-21; see Tr. 350, 356-57). Subsequently, based on information developed at the hearing, counsel also argued that the cumulation of exposures to pictures of the defendants rendered Mrs. Edgecomb's tentative identification on May 19 unfairly suggestive, in violation of Stovall v. Denno, supra, (Tr. 358-60).

10/ [continued from preceding page]

lineup array itself was unnecessarily suggestive because he was the only person with a goatee. Based on evidence developed at the hearing that Mr. Beaver and Mr. Korn had also seen the lineup photograph shortly before trial, in the absence of defense counsel (Tr. 85, 107-08, 117-19, 139-40), appellees orally moved to suppress testimony of these photographic identifications as violative of Wade, and any consequent in-court identification as thereby tainted (Tr. 20, 350, 356-57).

11/ The transcript erroneously refers to Mr. Edgecomb.

Mrs. Edgecomb's identification remains tentative, since the defendants waived their right to be present during the taking of testimony on the motions to suppress (Tr. 32-33).

At the conclusion of the hearing, the District Judge denied the motions to suppress testimony of Messrs. Beaver and Korn regarding their pretrial and any in-court identifications of the defendants (Tr. 401-02, 403) but granted the motion to suppress any identification testimony by Mrs. Edgecomb (Tr. 402, 407-09).

ARGUMENT

INTRODUCTION

In June of 1967, the Supreme Court decided the trilogy of "lineup cases" -- United States v. Wade, 388 U.S. 218, Gilbert v. California, 388 U.S. 263, and Stovall v. Denno, 388 U.S. 293. In Wade and Gilbert, in recognition of the inherent unreliability of eyewitness identification testimony and the normally conclusive nature of pre-trial identifications, the Court held that the pre-trial confrontation of an accused by a witness is a critical stage of the criminal process at which an accused is entitled by the Sixth Amendment to the assistance of counsel. In one of the leading post-Wade cases, this Court emphasized the two prongs of the Wade holding: that defense counsel's presence at pre-trial confrontations is

> necessary in order (1) to minimize the likelihood of an unduly suggestive confrontation and (2) to enable an informed challenge to be made at trial to either the admissibility or the credibility of identification evidence. 13/

12/ Clemons v. United States, 133 U.S. App. D.C. 27, 31, 408 F.2d 1230, 1234 (1968) (en banc), cert. denied, 394 U.S. 964 (1969).

In Stovall, the Court held that "the totality of circumstances surrounding" a confrontation may be "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] [is] denied due process of law,"[13/] and that any such unfair pre-trial identification and any resulting in-court identification must be excluded from evidence.

The evidence adduced on the motion to suppress in the instant case demonstrates that the procedures leading to Mrs. Edgecomb's identification of Brown and Proctor violated the principles enunciated in both Wade and Stovall.

In summary, the testimony relevant to Mrs. Edgecomb's identification of the defendants shows that although she was able to describe the robbers with some specificity, she had not identified either Brown or Proctor from a group of ten photographs shown to her on October 25, four months after the crime; that when Mrs. Edgecomb saw the same pictures of the defendants in a different group of eight the next day she chose the picture of Brown

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13/ Stovall v. Denno, supra, 388 U.S. at 302.

and one of a Jerome Harling as "resembling" the robbers; that when she saw Brown and Proctor (but not Harling) in a lineup nine days thereafter she did not identify either of them; and that eventually, some eleven months after the robbery, she tentatively identified Brown and Proctor when shown a photograph of the lineup by the prosecution in the absence of defense counsel. Having thoughtfully considered this testimony (Tr. 402), the District Judge found that

> In view of the fact that [Mrs. Edgecomb] had seen photographs over a period of time and not made the identification before or at the lineup of the defendants ... the later identification [from the lineup photograph] just might be subject to question. ... I think if [counsel] had been present there would have been no question about it. (Tr. 408.) ... [T]here is always a question in ... defense counsel's minds, as to just exactly what did happen at that time when she had not been able to determine prior thereto (Tr. 409). ... [S]ince this was after the lineup and close to the trial ... it would have perhaps been better if counsel had been present at the time (Tr. 407-08).

Accordingly, the Court ruled that

> in view of the fact that [Mrs. Edgecomb] did not pick out the people at the time of the lineup, and with an abundance of caution on behalf of the defendants, the Court will deny the use of her identification of the defendants in the photograph at a later time (Tr. 407).

The Court also ruled that Mrs. Edgecomb "should not make an in-court identification of the defendants at the time of her appearance here in fear it might be tainted in some way by the recent viewing of the photograph" (Tr. 408).

The Government interprets this ruling solely as a holding that the right to counsel requirements of United States v. Wade were violated when the prosecution showed Mrs. Edgecomb the lineup photograph shortly before trial and in the absence of the defendants or their counsel. The Government further contends that Judge Green "specifically rejected the existence of any" due process violation under Stovall v. Denno, because the Court stated that "there was nothing improper insofar as her having seen the photograph in [the prosecutor's] office" (Tr. 407) and that if counsel "had been

present there would have been no question about it" (Tr. 408). (Gov't. Brief at 5.) Moreover, the Government argues, the record fails to support any violation of due process in the showing of the lineup photograph. (Gov't. Brief at 5 n.7.)

In fact, however, Judge Green's ruling was based on two concurrent conclusions: first, that Wade does require the presence of counsel at a post-indictment display of photographs to a potential identifying witness, and, second, that the totality of circumstances culminating in the purported identification by Mrs. Edgecomb in the prosecutor's office was, in the words of Stovall, "so unnecessarily suggestive and conducive to irreparable mistaken identification"[14/] that the defendants would be denied due process of law were the court to permit testimony of that identification to be received in evidence. Moreover, even under the Government's interpretation of the court's ruling, since the record amply supports both conclusions, this Court may affirm the order of the District Court on either ground.[15/]

14/ Stovall v. Denno, supra, 388 U.S. at 302.

15/ See Helvering v. Gowran, 302 U.S. 238, 245-46 (1937).

(continued on page 19)

15/ (continued from page 18)

The Government has not challenged the further finding of the District Court that any possible in-court identification of the defendants by Mrs. Edgecomb should be excluded as "tainted in some way by the recent viewing of the photograph" (Tr. 408). This finding was clearly warranted. Among the factors to be considered in determining whether any in-court identification would be independent of a prior tainted identification are the opportunity of the witness to observe during the crime itself, any identification of another person prior to the tainted identification, any failure to identify the defendant on a prior occasion, and the lapse of time between the crime and the identification. United States v. Wade, supra, 388 U.S. at 241. Mrs. Edgecomb only observed the robbers for a few minutes on June 27, 1969 (see Tr. 157-60), she had never seen either of them before (Tr. 163-64), between June 27 and October 25 she chose pictures of several persons other than the defendants as "resembling" the robbers (Tr. 164-65, 182-83, 221-23), on October 25 she failed to identify the pictures of both Brown and Proctor, and on the following day she failed to identify the picture of Proctor (Tr. 205-06, 327-29), she failed to identify either defendant at the lineup on November 4 (Tr. 161), and the final tentative identification came almost eleven months after the robbery (Tr. 162-63, 226-28).

Plainly, therefore, the Government has failed to sustain its heavy burden of showing by "clear and convincing evidence" that any in-court identification by Mrs. Edgecomb would be based solely on her recollection of the robbers from June 27, 1969, and not affected in any way by her subsequent viewings of them in photographs or in the lineup. United States v. Wade, supra, 388 U.S. at 240-41; Gilbert v. California, supra, 388 U.S. at 272; Mason v. United States, 134 U.S. App. D.C. 281, 287, 414 F.2d 1176, 1182 (1969). In view of the "key role" played by the trial court in such matters, see Clemons v. United States, supra, 133 U.S. App. D.C. at 38, 408 F.2d at 1241, its appraisal of these facts should be affirmed.

I

THE PRINCIPLES AND HOLDING OF UNITED STATES V. WADE REQUIRE THE PRESENCE OF DEFENSE COUNSEL AT POST-INDICTMENT DISPLAYS OF PHOTOGRAPHS TO POTENTIAL IDENTIFYING WITNESSES

In United States v. Wade, 388 U.S. 218 (1967), the Supreme Court held that

> the principle of Powell v. Alabama [287 U.S. 45 (1932)] and succeeding cases requires that we scrutinize any pre-trial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. (388 U.S. at 227.)

The Court rejected the Government's contention that a pre-trial lineup was a mere preparatory step in the gathering of the prosecution's evidence similar to examinations of physical evidence by expert witnesses and equally open to meaningful confrontation by cross-examination at trial. The

"vagaries of eyewitness identification," the Court found, are sufficiently distinguishable from the reasonably fixed and accessible scientific techniques to warrant application of different rules to these two forms of preparation for trial. (388 U.S. at 227-28.)

The Court pointed out the serious problems inherent in eyewitness identification testimony, resulting from the fallacies of human observation and recollection. The Court was particularly concerned with the danger of subtle suggestions in a pre-trial confrontation of the accused, either in the way the suspect is presented or in the statements made to the witness before or during the viewing. (388 U.S. at 228-34.) These dangers are compounded, the Court emphasized, since the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial, either because the identities and appearances of the persons in the array are unavailable, or because the only defense witness present, the defendant himself, is unable to observe and recall

the other circumstances of the identifications. (388 U.S. at 229-32.)

Because of the well-known reluctance of a witness who has once identified a defendant to retract that identification later on, "'in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'"16/ Accordingly, the Court held,

> [i]nsofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pre-trial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard of his right to confront the witness against him. (388 U.S. at 235.)

Cross-examination, the Court concluded, even though "a precious safeguard to a fair trial, ... cannot be viewed as an absolute assurance

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16/ United States v. Wade, supra, 388 U.S. at 229, quoting Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 479, 482.

of accuracy and reliability." In sum, since the trial which might determine the accused's fate may well not be that in the courtroom but that at the pre-trial confrontation", "the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself". (388 U.S. at 235.)

The Court therefore held that a post-indictment lineup is "a critical stage of the prosecution at which [a defendant is] 'as much entitled to such aid [of counsel] ... as at the trial itself'. Powell v. Alabama, 287 U.S. 45, 57." (388 U.S. at 237 .)[17/] The rule is prophylactic and does not depend on proof of prejudice in each case.

Accordingly, the Court concluded, where a lineup has been held in the absence of defense counsel, no in-court identification by a witness who saw that lineup can be admitted unless the

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17/ Concurring, Justice Clark said succintly:

> I cannot, for the life of me, see why a lineup is not a critical stage of the prosecution. Identification of the suspect --pre-requisite to establishment of guilt -- occurs at this stage, and with Miranda v. Arizona, 384 U.S. 436 (1966), on the books, the requirement of the presence of counsel arises, unless waived by the suspect. (United States v. Wade, supra, 388 U.S. at 243.)

Government proves by "clear and convincing evidence that the in-court [identification is] based upon observations of the suspect other than the lineup identification." United States v. Wade, supra, 388 U.S. at 240. And in Gilbert v. California, supra, the Court held that evidence of an identification at a tainted pre-trial confrontation is per se inadmissible.

The underpinnings of the Wade holding are twofold: first, that the presence of defense counsel may prevent unfairness in the lineup array itself and in the circumstances under which the witnesses view the suspects, and therefore may avert an erroneous identification; and, second, that counsel will be better equipped to cross-examine the identifying witnesses at trial because he has been able to observe the identification proceeding and is thus aware of many of the factors relevant to the validity of the identification.

Although Wade itself involved a post-indictment lineup, this Court has held its rationale equally applicable to post-arrest stationhouse confronta-

tions, [18] to informal lineups at the Court of General Sessions prior to preliminary hearings, [19] and to pre-arrest confrontations arranged solely for the purpose of obtaining an identification, [20] because the right to counsel in such situations is "critical to the fair and efficient administration of justice." [21] These confrontations are less formal than a lineup but counsel can play a "useful role" "in suggesting procedures which might render the confrontation legally unassailable" and also assist in "accurately reconstructing the exact circumstances of the pre-trial confrontation" thereafter. United States v. Greene, supra, slip op. at 5-6. It follows inevitably, as the court below held, that Wade's right to counsel rule applies to

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18/ Wright v. United States, 131 U.S. App. D.C. 279, 404 F.2d 1256 (1969).

19/ Mason v. United States, 134 U.S. App. D.C. 281, 414 F.2d 1176 (1969).

20/ United States v. Greene, No. 22,923 (D.C. Cir., April 29, 1970); Long v. United States, _____ U.S. App. D.C. _____, 424 F.2d 799 (1969).

21/ United States v. Greene, supra, slip op. at 6.

post-indictment photographic identifications. 22/

Neither this Court nor the Supreme Court has yet ruled on the precise question here presented, that is, whether the defendant's counsel is entitled

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22/ In Mason v. United States, supra, 134 U.S. App. D.C. at 282, n.13, 414 F.2d at 1178, n.13, this Court cited with apparent approval the statement of the dissenting justices in Wade that the rule there announced "applies to any lineup, to any other techniques employed to produce an identification, and a fortiorari to a face-to-face encounter between the witness and the suspect alone, regardless of where the identification occurs, in time or place, and whether before or after indictment or information." United States v. Wade, supra, 388 U.S. at 251 (emphasis added). See also Note, The Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 181-82 (1967).

to be present at a post-indictment photographic identification proceeding,[23] Simmons v. United States 390 U.S. 377 (1968), the only case involving a photographic identification which has been decided by the Supreme Court, held it not a per se denial of due process to show photographs to witnesses in an attempt to identify the perpetrator of a crime before a suspect has been arrested or charged

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23/ The Government mistakenly suggests that in United States v. Hamilton, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969) and United States v. Kirby, ____ U.S. App. D.C. ____, 427 F.2d 610 (1970), this Court "has implicitly held" that Wade does not apply to such identifications. However, the opinion and record in Hamilton make clear that at the time the witness saw the photographs, the defendant was under arrest only for different crimes. 137 U.S. App. D.C. at 91, 420 F.2d at 1294. The Court characterized the situation as "an effort at photographic identification of the unknown guilty party." 137 U.S. App. D.C. at 91, 420 F.2d at 1294. In Kirby, the Court specifically stated that it "need not consider whether or in what circumstances a right of counsel for photograph identification might be urged as to defendants who have been taken into custody on cause of having committed the offense." The Court ruled only on the question of a right to counsel when the police, in an attempt to establish probable cause prior to arrest, show a witness photographs, including a picture of a potential defendant. The Court found Simmons v. United States, 390 U.S. 377 (1968) directly in point and thus held that a suspect "who is not present at the time of identification, has not been arrested for or charged with the crime, and is not in custody" has no right to counsel at photographic identification proceedings. ____ U.S. App. D.C. at ____, 427 F.2d at 612. Moreover, as we show later, p. 42 n. 38, the opinion in Kirby suggests a disagreement with the rationale of cases from some other circuits which hold Wade inapplicable to post-indictment photographic identifications.

with the offense, and nothing in the Court's opinion intimates that it would hold such a right non-existent at the post-indictment stage. 24/

24/ Because the pre-arrest photographic identification involved in Simmons occurred when suspicion had "focussed upon" the accused, the Government argues that case may be read to suggest that a photographic identification, whenever it occurs, is subject only to a due process challenge. Gov't. Brief at 6 n.8. However, in Simmons the Court specifically pointed out that no right to counsel question had been raised (390 U.S. at 383), and clearly limited its opinion to a discussion of the due process issue. Surely serious constitutional questions are not to be determined by possible inferences from a factual situation not even considered in dictum.

Equally importantly, the photographic identification in Simmons took place before the accused had become personally involved in the investigative process, a distinction implicit in the opinion in United States v. Zeiler, 427 F.2d 1303, 1307 n.3 (3d Cir. 1970):

> Simmons v. United States, 1968, 390 U.S. 377, upon which the government relies, did not deal with the issue of right to counsel at photographic identifications. The photographic identification in that case occurred prior to arrest and was part of the investigation process. However, when as in the present case, the investigation has resulted in the arrest of an accused, the right to counsel attaches. Moreover, while photographs are an important tool in investigating unsolved crimes and apprehending suspects, Simmons v. United States, supra, their use after the accused has been taken into custody is in most cases unnecessary. The requirement of counsel at photographic identifications conducted after the accused is in custody and available for a more reliable corporeal identification will not hinder the police in the legitimate enforcement of the law.

Photographic identifications such as that obtained by the prosecution in this case present many of the pitfalls which led to the ruling of Wade. First, since no representative of the defense was present at the pre-trial identification here, counsel are severely handicapped in an attempt to determine whether any unconscious words or gestures by the prosecution may have influenced Mrs. Edgecomb and unfairly led to her identification of the defendants. 25/ The Government's argument that counsel were able adequately to reconstruct the identification proceeding by cross-examination of the witnesses (Gov't. Brief at 8-9) already has been explicitly and decisively rejected by the Supreme Court in Wade: "any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of

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25/ The very fact that this identification was made only after Mrs. Edgecomb had been exposed to the defendants or their pictures on four occasions, and came shortly before trial, eleven months after the crime, compels the conclusion that some factor other than uninfluenced recognition led to the identification. See Part II of this Argument, infra at 45-51.

the police officers present." [26/] Where photographic displays are concerned, of course, not even the accused is present to observe to some limited extent the circumstances of the identifications. See United States v. Zeiler, 427 F.2d 1305, 1307 (3d Cir. 1970); United States v. Hamilton, supra, 137 U.S. App. D.C. at 82, 420 F.2d at 1295; Thompson v. State, 451 P.2d 704, 706 (Nev.), cert. denied, 396 U.S. 893 (1969); cf. United States v. Wade, supra, 388 U.S. at 230-31 and n.13. The need for the presence of counsel at such a confrontation is therefore even more compelling. As this Court recognized, in Mason v. United States, supra, 134 U.S. App. D. C. at 284, 414 F.2d at 1180, rejecting the Government's argument that a public General Sessions informal "lineup" is "capable of reconstruction at trial by enterprising defense counsel",

> An absence of secrecy, however, is at best a modest benefit if no one is watching. So long as only the policeman and the witness know that an identification confrontation is in progress,

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26/ 388 U.S. at 231 (footnotes omitted).

> the defendant will be hard put to discover the myriad subtle suggestions which may have passed from policeman to witness.

A second and equally important reason for requiring the attendance of defense counsel at post-arrest photographic identification proceedings is that regardless of whether the proceeding is fair or not, unless some representative of the defense is present, counsel may be unable to challenge adequately the accuracy of that identification at trial. See United States v. Wade, supra, 388 U.S. at 235; Clemons v. United States, supra, 133 U.S. App. D.C. at 31, 408 F. 2d at 1234. Since a witness who once identifies a suspect is unlikely to retract that identification later, and thus "'the issue of identity may ... for all practical purposes be determined [at the pre-trial confrontation], before the trial'", [27/] any pre-trial confrontation is a "critical

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27/ United States v. Wade, supra, 388 U.S. at 229.

stage" of the criminal proceedings, entitling the defendant to representation by counsel. The right protected by counsel here, of course, is the Sixth Amendment right to effective cross-examination of witnesses.[28/]

Thus the identification procedure followed in this case has caused all of the difficulties which Wade sought to forestall, except only that because the lineup photograph is available counsel have been able to reconstruct the array of persons from which Mrs. Edgecomb finally made her tentative identification of the defendants.

The interference with effective cross-examination and inquiry into the fairness of the totality of the identification procedures is substantial and demonstrates why the rationale of Wade applies equally to a post-indictment photographic identification.

Indeed, in Mason v. United States, supra, 134 U.S. App. D.C. at 282, 414 F.2d at 1178, this Court pointed out that the Supreme Court in Wade "suggested no reason why other identification

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28/ Pointer v. Texas, 380 U.S. 400 (1965).

confrontations should be any less 'critical'" than formal post-indictment lineups. The Government's argument seems to be that Wade is limited to "confrontations", that an examination of photographs is not a "confrontation", and that Wade is therefore inapplicable to such examinations. However, the same dangers of unfairness and suggestiveness exist in a display of photographs as in a corporeal lineup and counsel is even less able to cross-examine the witness adequately at the trial. To restrict Wade to situations where the defendant and the witness are face to face is to ignore the fact that in many lineups the defendant cannot see or hear the witness. See United States v. Wade, supra, 388 U.S. at 230-31. In such lineups there clearly is not a "face-to-face confrontation" between the defendant and his accuser. Cf. Mason v. United States, supra. Thus, the policy considerations underlying Wade must apply equally to photographic viewings.

Moreover, in this case as in Wade, "[n]o substantial countervailing policy considerations have been advanced against the requirement of the

the presence of counsel."[29] The Government cannot reasonably contend that notification to defense counsel would have unduly delayed the identification in this case or have caused any inconvenience whatever to either the prosecutor or the witnesses.[30] The indictments had been returned some six months before Mrs. Edgecomb saw the lineup photograph, and defense counsel and the prosecutor had been in reasonably constant communication for almost that entire period of time.

The only policy reason proposed by the Government against the presence of defense counsel is that the identification here involved occurred during a witness interview conducted by the prosecutor in preparation for an imminent trial (Gov't. Brief at 9-11). With deference to those courts

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29/ United States v. Wade, supra, 388 U.S. at 237.

30/ Cf. United States v. Kirby, supra, ____ U.S. App. D.C. at ____ n.2, 427 F.2d at 612 n.2, where the Court cited the statement in United States v. Hamilton, supra note 23, that appointment of counsel during an attempt to narrow the field of suspects from photographs "is an obvious impracticability." The converse of the Simmons-Hamilton holding that counsel is not required at such an identification session because appointment would be impractical, is that if it is clearly practical, counsel must be present.

which have adopted that argument,[31] we submit that it is fallacious. Obviously a prosecutor must interview witnesses prior to trial, and we do not suggest that defense counsel should be present while the prosecutor reviews the facts of the offense with these witnesses. Our contention is only that defense counsel should be present if the witness is shown a photograph or a group of photographs from which the Government hopes the witness will identify a defendant.

Given the premises that undue and irreparable suggestiveness may occur at a photographic viewing, and that effective cross-examination would be significantly aided by defense counsel's observations during that confrontation, "we can think of no sound reason why counsel should not be present at any such viewing."[32] Several courts have adopted

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31/ E.g., United States v. Bennett, 409 F.2d 888 (2d Cir.), cert denied, 396 U.S. 852 (1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968); People v. Adair, 2 Cal. App. 3d 92, 82 Cal. Rptr. 460 (1969). United States v. Cunningham, 423 F.2d 1269 (4th Cir. 1970), cited by appellant for this proposition, clearly dealt only with pre-arrest photographic viewings (423 F.2d at 1271) and the Court rejected only an argument that counsel should be present at post-identification interrogation of the witnesses (423 F.2d at 1273-74).

32/ Mason v. United States, supra, 134 U.S. App. D.C. at 282, 414 F.2d at 1178 (emphasis in original).

or noted with approval the view that the post-arrest exhibition of photographs is a "critical stage" of the proceedings entitling a defendant to representation by counsel. In United States v. Zeiler, supra, for example, the Court of Appeals for the Third Circuit squarely held "that the rule of the Wade case applies to pre-trial photographic identifications of an accused who is in custody." 327 F.2d at 1307. The identifications there involved occurred after appointment of counsel but prior to either indictment or a scheduled lineup. The Court pointed out that photographic identifications carry the same dangers of suggestion as corporeal lineups, that the defendant is even less able to reconstruct the proceeding since he himself is not present, and that a contrary holding might encourage the police either to prepare a witness for a lineup by presenting him with a series of suggestive photographs or to bypass the lineup

process altogether. Ibid.[33/]

Similarly, the Supreme Court of Pennsylvania has held, following Zeiler, that "Wade cannot be undercut simply by substituting pictures for people, nor can the police prepare a witness for the lineup by privately showing the witness pictures of the accused." Commonwealth v. Whiting, No. 213, Jan. T. 1970 (July 2, 1970). Accordingly, the court

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33/ The Court also pointed out that the use of photographs at all "after the accused has been taken into custody is in most cases unnecessary."

An earlier decision by the Third Circuit, United States v. Conway, 415 F.2d 158 (1969), appears at first reading to conflict with Zeiler. In Conway, the Court did hold Wade inapplicable to a photographic identification that occurred about a week after the crime, when the defendants were already in custody in a contiguous state. However, the court specifically reserved the question whether Wade might in some circumstances become operative at arrest, and indicated that a particularly important factor in this regard would be "whether an accused has counsel." The court specifically limited its holding to the circumstances of the particular case, including its conclusion that the pictures had been "displayed in a manner consistent with due process." 415 F.2d at 163. In any event, Conway clearly has been superseded by Zeiler; significantly, the opinions in both cases were written by Judge Hastie, and concurred in by Judge Van Dusen.

held, Whiting's right to counsel had been infringed when the victim of a purse snatching was shown a group of eight photographs, from which she identified him, about an hour after his arrest. So too, the Supreme Court of Nevada has held that there is "no substantial distinction between a lineup and a substituted photographic display while the suspect is in custody" and thus that Wade and Gilbert establish a right to counsel at such a photographic identification proceeding. Thompson v. State, 451 P.2d 704, 707, cert. denied, 396 U.S. 893 (1969).[34/]

34/ The Nevada court has indicated that exhibition of photographs pursuant to proper guidelines and preservation of those photographs for use by defense counsel may permit counsel adequately to probe the accuracy of any identification at trial and thus may suffice as a substitute for counsel. See Carmichael v. State, 467 P.2d 108 (Nev. 1969); Thompson v. State, supra, 451 P.2d at 707. However because Wade was based on part on the inability of counsel who was not present at the identification proceeding to reconstruct suggestive influences that might have occurred apart from the array itself, and to gauge the quality of the witness' response to the array, the suggestion of the Nevada court is not a satisfactory solution to the problems presented by photographic identifications.

Other courts have suggested agreement with this interpretation of Wade. For example, in Cox v. State, 219 So. 2d 762 (Fla. Dist. Ct. App. 1969), the Court held that an accused in custody has a right to representation by counsel when a witness is shown a video tape of his actions during the booking process. 35/ In People v. Adams, 19 Mich. App. 131, 172 N.W. 2d 547 (1969), the state conceded that the exhibition of photographs was as critical a stage as a lineup; however, in that case the defendant was held to have waived his right to object to admission of the photographic or in-court identifications. See also State v. Carrothers, 79 N.M. 347, 443 P.2d 517 (1968), where the court assumed "that all pre-trial identification of a suspect in custody, whether in person or by photograph, after counsel has been appointed or employed, is tainted unless counsel be present", but found an independent source for the in-court identification.

35/ But see Wilson v. State, 235 So. 2d 10 (Fla. Dist. Ct. App. 1970).

Although several federal courts have adopted the position urged by the Government in this case, few have discussed the question at any length. For example, in McGee v. United States, 402 F.2d 434, 436 (10th Cir. 1968), cert. denied, 394 U.S. 908 (1969), the court badly stated that a photographic display is neither a lineup or a confrontation of the accused and therefore concluded that Wade should not be extended to cover such a proceeding. 36/ In United States v. Collins, 416 F.2d 696 (4th Cir. 1969), cert. denied, 396 U.S. 1025 (1970), the court recognized that the exhibitor of photographs might clue the witness and thus render any identification violative of due process, but ruled without any extensive discussion that this danger was not strong enough to require the presence of counsel at such photographic displays. Judge Winter dissented, concluding that a photographic identification is a "critical stage" at which counsel must be present, because of the possibility of inadvertent and unobvious suggestiveness which only counsel might be able to

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36/ Rech v. United States, 410 F.2d 1131 (10th Cir.) cert. denied, 396 U.S. 970 (1969), also cited by the Government, merely relied on McGee.

recognize and thus reconstruct at trial.[37/]

In United States v. Bennett, 409 F.2d 888 (2d Cir.), cert. denied, 396 U.S. 852 (1969), the court held Wade inapplicable to post-arrest photographic identifications, essentially because

> to require that defense counsel be allowed or appointed to attend out-of-court proceedings where the defendant himself is not present would press the Sixth Amendment beyond any previous boundary. (409 F.2d at 899.)

The Court then reasoned that a contrary ruling would permit counsel to be present "when the prosecution is interrogating witnesses in the defendant's absence", although other aspects of witness interviews (on both sides) present similar opportunities for suggestiveness. However, this reasoning is not

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37/ In Collins, Judge Winter was particularly concerned by the fact that none of the witnesses was able to identify the defendant in court, supposedly because he had lost a substantial amount of weight since the photograph had been taken. However, Judge Winter's position generally is that Wade does apply to all post-arrest photographic identifications. See the concurring opinions in United States v. Canty, No. 13,793 (4th Cir., August 3, 1970) and United States v. Marson, 408 F.2d 644, 651 (4th Cir. 1968).

persuasive. Permitting counsel to observe the identification proceeding by no means authorizes him to intrude on that portion of the witness interview in which the prosecutor prepares the witness to testify at trial on the facts of the offense. That this part of the interview presents an opportunity for suggestion by the prosecutor is no reason to deny a defendant representation while a photograph is displayed to a witness in order to attempt an identification, if that photographic display constitutes a "critical stage of the proceedings" in the constitutional sense.[38/] The rationale of Wade and Gilbert is that the identification proceeding is a critical stage, at which counsel indeed is necessary "to see to it that all available defenses are proffered"[39/] at trial -- that is, that if counsel is not present

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38/ In United States v. Kirby, supra, ____ U.S. App. D.C. at ____, 427 F.2d at 612 n.2, this Court indicated disagreement with the analogy proposed in Bennett that there may be suggestiveness at any witness interview, since "the prosecution could not introduce testimony on direct of the statements given by the witness in an earlier interview with prosecutor". By thus agreeing that the photographic identification is a more "critical" stage than the ordinary pre-trial witness interview, this dictum in Kirby foreshadows the ruling we ask this Court to make in this case.

39/ United States v. Bennett, supra, 409 F.2d at 900.

at that time he will be unable properly to challenge the fairness or the accuracy of any consequent identification. Assuming the validity of this rationale, the inevitable conclusion is that representation by counsel at post-indictment photographic identification proceedings is necessary in order to insure the presentation of an adequate defense at trial. 40/

In sum, a pre-trial photographic identification proceeding presents may of the dangers of subtle suggestion that are possible in a corporeal confrontation between a suspect and a witness. Moreover, since not even the defendant is present to observe to a limited extent the actions of the police and the reactions of the witness, defense counsel is seriously handicapped in his ability to challenge effectively the fairness and accuracy of any resulting identification. Finally, no valid reason has been suggested why the defendant should

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40/ The Fifth Circuit, in United States v. Ballard, 423 F.2d 127 (1970), merely adopted the reasoning of Bennett.

It is far from clear that the Ninth Circuit has adopted the Government's position. Its opinion in United States v. Sartain, 422 F.2d 387 (1970) phrases the issue presented as whether identification testimony should have been stricken under Wade, but then states only that there was no evidence that the photographic viewing affected the

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not be represented by counsel at post-arrest photographic identification proceedings. Accordingly, the trial court correctly ruled that the defendants' right to counsel was infringed when Mrs. Edgecomb was shown the lineup photograph immediately before trial in the absence of defense counsel, and properly granted the defendants' motion to suppress any photographic or in-court identification testimony by Mrs. Edgecomb.

40/ (continued)

in-court identifications or was impermissibly suggestive. The Court cited Conway, which has been superseded by Zeiler, see pp. 36-37, supra, and United States v. Stinson, 422 F.2d 356 (9th Cir. 1969). The latter case apparently did not involve a Wade challenge to a post-arrest photographic identification; Wade is mentioned only in connection with a lineup. In the discussion of photographs in Stinson the court does not indicate that they were displayed after arrest, and it cites only Simmons and two earlier Ninth Circuit cases, Anderson v. United States, 406 F.2d 770 (1969), which held that the defendant had waived any Wade objection to the use of photographs, and Hill v. United States, 401 F. F.2d 995 (1968), where the court discussed only a due process objection.

The Seventh Circuit has not ruled on the question; United States v. Robinson, 406 F.2d 64, cert. denied, 395 U.S. 926 (1969) involved a pre-arrest, pre-Wade display of photographs, accordingly Simmons was directly in point. Nor have we found any relevant decisions or dicta in the First, Sixth, or Eighth Circuits.

II

THE IDENTIFICATION PROCEDURES CULMINATING IN MRS. EDGECOMB'S TENTATIVE IDENTIFICATION OF THE DEFENDANTS FROM THE LINEUP PHOTOGRAPH DENIED THE DEFENDANTS DUE PROCESS OF LAW

As a concurrent and independent ground for excluding identification testimony by Mrs. Edgecomb, the District Judge ruled that

> [i]n view of the fact that [Mrs. Edgecomb] had seen photographs over a period of time and not made the identification before or at the lineup of the defendants ... the later identification just might be subject to question. (Tr. 408).

This constituted a finding that "the totality of the circumstances surrounding" that May 19th identification by Mrs. Edgecomb was "so unnecessarily suggestive and conducive to irreparable mistaken identification"[41/] that the defendants would be denied due process of law were Mrs. Edgecomb permitted to testify at trial about her identification of them from the lineup photograph. In its appraisal of the evidence the trial court was clearly correct.

The evidence developed below strongly indicates that Mrs. Edgecomb's tentative identification of the defendants on May 19, 1970 (Tr. 162-63) was the result of repeated exposures to the defendants and their photographs, rather

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41/ Stovall v. Denno, supra, 388 U.S. at 301-02; accord, Simmons v. United States, supra, 390 U.S. at 384.

than an uninfluenced recollection of the robbers as they appeared eleven months earlier. Mrs. Edgecomb had never seen the robbers before June 27, and became aware of their presence in the liquor store only after the shooting of Mr. Burka (Tr. 150-51, 163-64). She testified that she saw the face of the first robber for what seemed like three minutes, but pointed out that "everything ... was exaggerated as far as time is concerned" (Tr. 156, 153-59). She saw the second robber closely in a "very dark corner" of the store, as she stood behind the counter at the side of the gunman's victim (Tr. 155-56, 159-60).

While Mrs. Edgecomb was able to describe the robbers in some detail at the hearing (Tr. 159-61), she did not recall giving any description to the police immediately after the robbery, since "it was terrible" (Tr. 168).[42/] Nor had she continued to reflect on the appearance of the gunmen during the intervening months. Indeed, Mrs. Edgecomb had consciously tried to put the memory of that shocking event out of her mind, not even discussing it with her husband: "we wanted to forget about it at that time. I didn't want to think about it. ... I just don't believe in thinking about destructive things." (Tr. 171-172).

42/ During the robbery, the second gunman had repeatedly threatened to kill everyone unless the safe were opened quickly (Tr. 153-54).

On at least one occasion before October 26, 1969, Mrs. Edgecomb chose photographs of certain persons other than the defendants as resembling the robbers (Tr. 219-23; see Tr. 164-65, 181-83), however, it seems that none of these suspects was ever placed in a lineup for her to see in person. On October 25, 1969, the police showed her a group of ten photographs including one each of Brown and Proctor; this first time that she saw pictures of the defendants she did not identify them (Tr. 203-06, 211). The next day, the police brought her a somewhat smaller group of photographs; again the pictures of Brown and Proctor appeared but none of the other pictures had been in the packet shown her the day before (Tr. 327-30, 333-34; compare Government Exhibits 5 and 10). On this second exposure Mrs. Edgecomb said that she "liked" the pictures of Brown and one Jerome Harling (Tr. 329, 333-34).[43/] However, she was not certain of these identifications and asked to see both Brown and Harling in a lineup (Tr. 329).

43/ The trial judge sustained the Government's objection to a defense question designed to reveal how the police chose the pictures which they displayed to Mrs. Edgecomb on October 25 and 26 (Tr. 345). However, since a written statement was obtained from the informant Foreman on October 28, and no pictures of the defendants had appeared in the packets shown to the witnesses before that day (see Tr. 99-100, 200-02, 215-24, 233-34, 311-12, 315-17), the compelling inference is that by October 25 the police were in contact with Foreman and were attempting to obtain a corroborating identification from Mrs. Edgecomb, perhaps their most articulate witness. This would explain why, when Mrs. Edgecomb failed to identify either of the defendants on the 25th, the police returned the following day with the same pictures of the defendants.

The following week, at the November 4th lineup, Brown and Proctor appeared although Earling did not (Tr. 334-35). At this corporeal confrontation, Mrs. Edgecomb did not identify either of the defendants. She claims now to have been unable to distinguish the features of the persons in the lineup because of the brightness of the lights (Tr. 162, 165-66, 175), yet she did not ask that the lights be turned down because she was afraid that the people in the lineup would then be able to see her (Tr. 166, 176, 181).[44] Only on May 19, 1970, eleven months after the offense and the fourth time she was presented with the defendants or their pictures for the purpose of effecting an identification, did Mrs. Edgecomb finally state that she "believed" they "were responsible for this offense" (Tr. 225-31). The inference is overwhelming that the May 19 identification was the result of the repeated exposure to pictures of these defendants and not the fruit of a clear, untainted recollection of the robbers as they appeared on June 27, 1969.

While each case raising a due process objection to a pretrial identification must be judged on its own facts,[45]

44/ Mrs. Edgecomb's fear in police headquarters during the lineup, when its participants were on the other side of a wire mesh (Tr. 181) and many policemen were present, casts serious doubt upon her ability to observe during the robbery when an armed gunman had already shot one man and was threatening to kill everyone in the store.

45/ Simmons v. United States, supra, 390 U.S. at 384.

the courts have described several factors that are relevant to the question whether a particular procedure is unnecessarily suggestive. Among the most frequently discussed considerations where a photographic identification is in issue is whether the exigencies of the situation justified the use of photographs rather than the more reliable technique of a lineup. E.g., Simmons v. United States, supra, 390 U.S. at 386, n.6; United States v. Hamilton, supra, 137 U.S. App. D.C. at 91, 420 F.2d at 1294; United States v. Cunningham, supra, 423 F.2d at 1272; United States v. Washington, 292 F. Supp. 284, 288 (D.D.C. 1968). When the suspect is in custody, as Brown and Proctor were in May of 1970, the necessity for a photographic presentation has been described as "nil". United States v. Washington, supra, 292 F. Supp. at 288.

Another significant factor in determining whether a photographic identification is unduly suggestive is the freshness of the identification; the longer the interval between the offense and the confrontation, the more dubious the validity of the identification. United States v. Simmons, supra, 390 U.S. at 385 ; United States v. Hamilton, supra, 137 U.S. App. D.C. at 91, 420 F.2d at 1294; United States v. Ballard, supra, 423 F.2d at 132; United States v. Washington, supra; see United States v. Gaines, No. 23,369 (D.C. Cir., August 27, 1970), slip op. at 4-5; United States v. McNair, No. 22,372 (D.C. Cir., April 8,1970). This Court has recognized that "fresh identification" promotes

"fairness, by assuring reliability".[46] In the Washington case, Judge Youngdahl found that an interval of two months between the robbery and the photographic identification, combined with a complete lack of necessity for the use of pictures since the defendant was in custody, resulted in "a serious violation of due process." A fortiorari, in the instant case, where the photographic identification occurred eleven months after the crime, while the defendants were in custody, the trial court properly concluded that the integrity of that evidence is open to grave question and that the evidence therefore should be excluded.

A third factor of particular relevance in this case is the number of times a suspect is presented to a witness in an attempt to obtain an identification. Foster v. California, 394 U.S. 440 (1969); see Simmons v. United States, supra, 390 U.S. at 386 n.6. In Foster, the Court condemned an identification obtained only after the witness had seen the defendant in a three-man lineup, then in a one-to-one confrontation, and finally, ten days later, at a second lineup in which the defendant was the only person who had also participated in the earlier array. As the Court said,

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46/ Wise v. United States, 127 U.S. App. D.C. 279, 282, 383 F.2d 205, 209 (1967), cert. denied, 390 U.S. 964 (1968). In Russell v. United States, 133 U.S. App. D.C. 77, 81, 408 F.2d 1280, 1284 (1968) the Court pointed out that

> Though the image of an 'unforgettable face' may occasionally linger without any translation into words, photographic recall is most often ephemeral. Vivid in the flash of direct observation, it fades rapidly with time.

> [t]he suggestive elements in this identification procedure made it all but inevitable that [the victim] would identify petitioner whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, "This is the man." ... This procedure so undermined the reliability of the eyewitness identification as to violate due process." (394 U.S. at 443) (emphasis in original).

The identification that the Government proposes to offer against appellees in this case was made by Mrs. Edgecomb only after she had been exposed to appellees or their pictures on four separate occasions. On October 25, she did not identify either Brown or Proctor from a group of ten men. The next day, seeing the same pictures of Brown and Proctor in a group of six different persons, Mrs. Edgecomb only tentatively chose the picture of Brown and asked to see him and another man in a lineup. Disregarding her request to see Harling in the lineup, and thus suggesting their belief that Brown but not Harling was involved in the crime, the police brought Mrs. Edgecomb to a lineup the next week. However, she did not identify either Brown or Proctor at that time, claiming their faces were indistinct. Six months later and eleven months after the crime, although in the meantime she had suppressed her memories of the way the robbers looked on June 27, Mrs. Edgecomb said that Brown and Proctor, as they appeared in the lineup photograph, "looked familiar." In the circumstances, the trial court could have reached no other conclusion but that this familiarity stemmed not from

a recollection of the robbers from June 27, 1969, but rather from the repeated occasions since that day on which the police had presented the witness with Brown and Proctor or their pictures. 47/

Because the procedures leading to Mrs. Edgecomb's identification of Brown and Proctor from the lineup photograph were unnecessarily suggestive, the District Court's order suppressing that identification must be affirmed.

47/ Significantly, the trial court found that the procedures employed in this case caused a substantial risk of "irreparable mistaken identification" even before hearing the defense case during trial.

Appellee Proctor also presses on this appeal the argument he raised in the District Court (Tr. 24, 26-31; see pp. 11-12 & n. 10 supra) that the lineup array was unnecessarily suggestive as to him because the witnesses had described the first robber as wearing a small goatee and moustache (Tr. 72-73, 100-01, 111,132,141-42, 160, 175) and Proctor was the only person in that lineup with such facial hair. The courts have recognized that a lineup is unfairly suggestive if the person suspected by the police is the only person therein with a peculiar characteristic described by the witnesses. See, e.g., Foster v. California, supra; United States v. Wade, supra. Indeed, this sort of unfair stacking of lineups was a primary cause of the Supreme Court's holding in Wade that counsel must be present at these proceedings.

This Court has repeatedly pointed out that in order to properly represent their clients at lineups, counsel must be advised of the names of the witnesses who will attend and the descriptions which these witnesses have given the police. United States v. Kirby, supra, ____U.S. App. D.C. at _____, 427 F.2d at 613-14 & n.5; Long v. United States, ____U.S. App. D.C._____, 424 F.2d 799 (1969); United States v. Allen, 133 U.S. App. D.C. 84, 408 F.2d 1287 (1969). Because Proctor's counsel was not provided with this essential information (Tr. 26-31), he was unable effectively to represent his client during the lineup, and the resulting array was unfairly prejudicial as to Proctor.

CONCLUSION

WHEREFORE, it is respectfully submitted that the order of the District Court suppressing any photographic or in-court identification of the defendants Rufus Brown and Paul Proctor by Mrs. Barbara Edgecomb should be affirmed.

Respectfully submitted,

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